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# REGULATIONS

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For information concerning the different types of regulations, see the Information Page.

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## Symbol Key

Roman type indicates existing text of regulations. Underscored language indicates proposed new text.  
Language that has been stricken indicates proposed text for deletion. Brackets are used in final regulations to indicate changes from the proposed regulation.

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## TITLE 22. SOCIAL SERVICES

### DEPARTMENT FOR THE AGING

#### Final Regulation

Title of Regulation: **22VAC5-30. The Virginia Public Guardian and Conservator Program (adding 22VAC5-30-10 through 22VAC5-30-60).**

Statutory Authority: §2.2-712 of the Code of Virginia.

Effective Date: January 1, 2009.

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#### Summary:

*The regulation sets forth requirements for the statewide Virginia Public Guardian and Conservator Program to ensure uniformity among programs in serving eligible persons, at public expense, who need a guardian or conservator or both, to assist them in meeting essential requirements for physical and emotional health and management of financial resources, as appropriate.*

*Based upon public comment, the proposed regulation has been amended to (i) clearly establish an ideal ratio of clients to paid staff of 20 incapacitated persons to every one paid full-time staff; (ii) include language to address emergency of unusual circumstances for programs to voluntarily serve five additional persons; (iii) include language requiring VDA, in consultation with the advisory board, to establish written procedures for public programs to obtain waivers regarding deviations in the ideal ratio of clients to paid staff; (iv) under "Appointments," included language to address existing information available to assist the multidisciplinary panel in screening of cases for individuals receiving case management services through a community services board (CSB) or behavioral health authority (BHA); and (v) add language requiring multidisciplinary panels to affirmatively recommend limitations on the scope of guardianship, where appropriate, as part of the screening process. In addition, some existing language has been amended or re-positioned to more clearly state the program's intent and duty to encourage incapacitated persons to participate in decisions, to act on their own behalf, and*

*to develop or regain the capacity to manage their personal affairs, where possible.*

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

Changes Since Proposed is not available

#### CHAPTER 30

#### THE VIRGINIA PUBLIC GUARDIAN AND CONSERVATOR PROGRAM

#### 22VAC5-30-10. Definitions.

The following words and terms when used in this regulation shall have the following meaning unless the context clearly indicates otherwise:

"Advisory board" means the Virginia Public Guardian and Conservator Advisory Board as authorized by §§2.2-2411 and 2.2-2412 of the Code of Virginia.

"Client" means a person who has been adjudicated incapacitated and who is receiving services from a public guardian program.

"Conservator" means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person and, where the context plainly indicates, includes a "limited conservator" or a "temporary conservator." The term includes (i) a local or regional program designated by the Department for the Aging as a public conservator pursuant to Article 2 (§2.2-711 et seq.) of Chapter 7 of Title 2.2 of the Code of Virginia or (ii) any local or regional tax-exempt charitable organization established pursuant to §501(c)(3) of the Internal Revenue Code to provide conservatorial services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Virginia Department for the Aging (VDA) as a public conservator, it may also serve as a conservator for other individuals. Incorporated by reference to this definition is the definition of "conservator" found in §37.2-1000 of the Code of Virginia and any successor language thereof.

"Guardian" means a person appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety,

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habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes (i) a local or regional program designated by the Department for the Aging as a public guardian pursuant to Article 2 (§2.2-711 et seq.) of Chapter 7 of Title 2.2 of the Code of Virginia or (ii) any local or regional tax-exempt charitable organization established pursuant to §501(c)(3) of the Internal Revenue Code to provide guardian services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Virginia Department for the Aging as a public guardian, it may also serve as a guardian for other individuals. Incorporated by reference to this definition is the definition of "guardian" found in §37.2-1000 of the Code of Virginia and any successor language thereof.

"Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition. A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 of the Code of Virginia unless the court order entered pursuant to this chapter specifically provides otherwise. Incorporated by reference to this definition is the definition of "incapacitated person" found in §37.2-1000 of the Code of Virginia and any successor language thereof.

"Indigency" means the client is a current recipient of a state-funded or federally funded public assistance program for the indigent or as otherwise defined in §19.2-159 of the Code of Virginia.

"Least restrictive alternatives" means, but is not limited to money management services including bill payer and representative payee services, care management, and services provided pursuant to a financial or health care power of attorney.

"Minimal fee" means allowable fees collected or payable from government sources and shall not include any funds from an incapacitated person's estate.

"Public guardian program" means a local or regional public or private nonprofit entity or program designated by VDA as a public guardian, a public conservator or both, pursuant to §§2.2-712 and 2.2-713 of the Code of Virginia, and operating under a contract entered into with VDA.

## **22VAC5-30-20. Introduction and purpose.**

A. Introduction. Pursuant to §2.2-711 of the Code of Virginia, the General Assembly declared that the policy of the Commonwealth is to ensure the appointment of a guardian or conservator to persons who cannot adequately care for themselves because of incapacity to meet essential living requirements where (i) the incapacitated person is indigent, and (ii) there is no other proper and suitable person willing and able to serve in such capacity.

B. Purpose. This regulation sets forth requirements for the statewide program of local and regional public guardian programs and establishes the requirements for local and regional entities to operate a designated public guardian program.

## **22VAC5-30-30. Public guardian programs.**

A. Designation. VDA shall select public guardian programs in accordance with the requirements of the Virginia Public Procurement Act. Only those programs that contract with VDA will be designated as public guardian programs. Funding for public guardian programs is provided by the appropriation of general funds.

B. Authority. A public guardian program appointed as a guardian, a conservator, or both as a guardian and conservator, shall have all the powers and duties specified in Article 1 (§37.2-1000 et seq.) of Chapter 10 of Title 37.2 of the Code of Virginia, except as otherwise specifically limited by a court.

### C. Structure.

1. Each public guardian program shall have a program director who supervises and is responsible for providing guardianship services to any incapacitated persons assigned by the court and to provide overall administration for the public guardian program. The program director must be a full-time employee of the program and have experience as a service provider or administrator in one or more of the following areas: social work, case management, mental health, nursing or other human service programs. The program director must also demonstrate by objective criteria, a knowledge and understanding of Virginia's guardianship laws, alternatives to guardianship, and surrogate decision making activities. The program director shall attend all training and activities required by VDA.

2. Each public guardian program shall establish a multidisciplinary panel to (i) screen cases for the

purpose of ensuring that appointment of a guardian or conservator is appropriate under the circumstances and is the least restrictive alternative available to assist the incapacitated person [ . This screening shall include a duty to recommend the most appropriate limitations on the power of the guardian or conservator, if any, to ensure that the powers and duties assigned are the least restrictive, ] and (ii) annually review cases being handled by the program to ensure that a guardian or conservator appointment remains appropriate. Composition of a multidisciplinary panel should include representatives from various human services agencies serving the city, county, or region where the public guardian program accepts referrals. If serving a region, the multidisciplinary panel shall have at least one representative from each local jurisdiction within the region. To the extent appropriate disciplines are available, this panel [ may should ] include but is not limited to representation from:

- a. Local departments of social services, adult protective services;
- b. Community services boards [ or behavioral health authorities ] ;
- c. An attorney licensed by the Virginia State Bar;
- d. Area agencies on aging;
- e. Local health departments;
- f. Nursing home, assisted living, and group home administrators; and
- g. Physicians and community representatives.

#### D. Client ratio to paid staff.

1. Each public guardian program shall maintain a direct service ratio of clients to paid staff that does not exceed [ VDA's established ideal ratio of ] 20 incapacitated persons to every one paid full-time staff person [ 20:1 ] . [ ~~A deviation up to and including 30 incapacitated persons to every one paid full time staff person may be authorized by VDA, in writing, where the proposed plan for staffing ensures that the guardian or conservator will maintain sufficient contacts with the incapacitated person. For the purposes of this section, the term "sufficient contacts" means that the guardian or conservator has an appropriate amount of contact with the incapacitated person to know of his capabilities, limitations, needs, and opportunities; and, to the extent feasible, the guardian or conservator shall encourage the incapacitated person to participate in decisions to act on his own behalf and to develop or regain the capacity to manage his personal affairs. ]~~

2. Each public guardian program shall have in place a plan to immediately provide notice to the circuit court(s)

in its jurisdiction and to VDA when the program determines that it may exceed its [ ~~maximum ideal~~ ] ratio of clients to paid staff.

3. [ ~~In an emergency or unusual circumstance, each program, in its discretion, may exceed VDA's established ideal ratio by no more than five additional incapacitated persons. Each program shall have in place a policy to immediately provide notice to VDA when such an emergency or unusual circumstance occurs and when the emergency or unusual circumstance ends and the ideal ratio has returned to 20:1. The notice to VDA shall comply with policy established by VDA. Other than an emergency or unusual circumstance as described in the preceding sentence, a waiver must be requested to exceed VDA's established ideal ratio. ] VDA [ , in consultation with the advisory board, ] shall establish written procedures for public guardian programs to obtain appropriate waivers regarding deviations in the [ ideal ] ratio of clients to paid staff. Procedures shall comply with § [ §2.2-712 and ] 2.2-713 of the Code of Virginia. VDA shall [ ~~inform the Advisory Board whenever a waiver is issued to a Public Guardian Program~~ report waiver requests and status of granted waivers to the advisory board at its regularly scheduled meetings ]. VDA shall review such waivers every six months [ ~~until the ratio of clients to paid staff does not exceed 20 incapacitated persons to every 1 paid staff person~~ to ensure that there is no immediate threat to the person or property of any incapacitated person nor that exceeding VDA's established ideal ratio is having or will have a material and adverse effect on the ability of the program to properly serve all of the incapacitated persons it has been designated to serve ].~~

#### E. Appointments.

1. Prior to the public guardian program accepting an individual for services, the multidisciplinary panel, described in 22VAC5-30-30 C 2, shall screen referrals to ensure that:

- a. The public guardian program is appointed as guardian, or conservator, or both only in those cases where guardianship [ or conservatorship ] is the least restrictive alternative available to assist the individual;
- b. The appointment is consistent with serving the type of client identified by the established priorities of the public guardian program;
- c. The individual cannot adequately care for himself;
- d. The individual is indigent; and
- e. There is no other proper or suitable person or entity to serve as guardian.

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[ f. In the case of an individual who receives case management services from a community services board (CSB) or behavioral health authority (BHA), the multidisciplinary panel may also request the results of the "determination of capacity" as authorized by 12VAC35-115-145 (Determination of capacity to give consent or authorization) and verification that no other person is available or willing to serve as guardian pursuant to 12VAC35-115-146 E (Authorized representatives). ]

2. Appointments by a circuit court shall name the public guardian program, rather than an individual person, as the guardian, the conservator or both guardian and conservator.

3. A public guardian program shall only accept appointments as guardian, conservator, or both guardian and conservator that generate no fee or that generate a minimal fee.

## F. Services.

1. A public guardian program shall have a continuing duty to seek a proper and suitable person who is willing and able to serve as guardian, conservator, or both guardian and conservator for the incapacitated person.

[ 2. The guardian or conservator shall encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage his personal affairs to the extent feasible. ]

[ ~~2.~~ 3. ] The multidisciplinary panel, described in 22VAC5-30-30 C 2, shall review active cases at least once every 12 months to determine that:

- a. The client continues to be incapacitated;
- b. The client continues to be indigent; and
- c. There is no other proper or suitable person or entity to serve as guardian, conservator, or both guardian and conservator.

[ ~~3.~~ 4. ] Each public guardian program shall set priorities with regard to services to be provided to incapacitated persons in accordance with its contract with VDA.

[ ~~4.~~ 5. ] Each public guardian program shall develop written procedures and standards to make end-of-life decisions or other health-related interventions in accordance with the expressed desires and personal values of the incapacitated person to the extent known. If expressed desires or personal values are unknown, then written procedures [ ~~should~~, including an ethical decision-making process, shall be used to ] ensure that the guardian or conservator acts in the incapacitated person's best interest and exercises reasonable care, diligence and prudence on behalf of the client.

[ ~~5.~~ 6. ] The public guardian program shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the incapacitated person. Impropriety or conflict of interest arises where the public guardian program has some personal or agency interest that might be perceived as self-serving or adverse to the position or the best interest of the incapacitated person. Examples include, but are not limited to, situations where the public guardian program provides services such as housing, hospice or medical care directly to the client. VDA reserves the right to monitor all administrative, programmatic, and financial activities related to the public guardian program to ensure compliance with the terms of the contract between VDA and the public guardian program.

[ ~~6.~~ 7. ] Each public guardian program and its employees are required to report any suspected abuse, neglect, or exploitation in accordance with §63.2-1606 of the Code of Virginia that provides for the protection of aged or incapacitated adults, mandates reporting, and provides for a penalty for failure to report.

[ ~~7.~~ 8. ] Each public guardian program shall submit data and reports as required by VDA and maintain compliance with VDA program guidelines. VDA shall periodically monitor administrative, programmatic, and financial activities related to the public guardian program to ensure compliance with the terms of the contract between the public guardian program and VDA.

## **22VAC5-30-40. Personnel standards.**

A. Each paid staff who is working in the public guardian program and has direct contact with clients or client estates shall:

1. Complete an orientation program concerning guardian and conservator duties to include the following subjects:
  - a. Privacy and confidentiality requirements;
  - b. Recordkeeping;
  - c. Services provided, and standards for these services;
  - d. A historical and factual review about the needs of the elderly and people with disabilities; and
  - e. Indications of and actions to be taken where adult abuse, neglect, or exploitation is suspected.
2. Have a satisfactory work record and be a person of good character; demonstrate a concern for the well-being of others to the extent that the individual is considered suitable to be entrusted with the care, guidance, and protection of an incapacitated person; and have not been convicted of any criminal offense involving any physical attack, neglect or abuse of a

person, lying, cheating, or stealing nor convicted of any felony. A criminal record check will be conducted on each person hired on or after January 1, 2009.

3. Be free of illegal drug use as confirmed by a drug screening test conducted prior to the assumption of any duties with an incapacitated person for each person hired on or after January 1, 2009.

4. Demonstrate, by objective criteria, knowledge of Virginia's guardianship laws and alternatives to guardianship. For each person hired on or after January 1, 2009, minimum education requirements apply and include a high school diploma or general education diploma (GED) from a Virginia accredited program and training or course work on (i) the duties and powers of guardians and conservators in Virginia, [ including an understanding of surrogate decision making and how it differs from substituted judgment decision-making standards, ] (ii) mandatory reporting requirements to the Department of Social Services and Commissioner of Accounts where applicable, and (iii) working with special needs populations including individuals with physical and mental disabilities. Program directors have additional requirements as specified in 22VAC5-30-30 C 1.

5. Participate in mandatory training programs required by VDA.

## B. Volunteers.

1. Volunteers may be recruited and used to supplement paid staff. However, volunteers shall not be included in the public guardian program direct service ratio of 20 incapacitated persons to every one paid staff person as required under 22VAC5-30-30 D 1.

2. Volunteers may not exercise the authority of a guardian or conservator.

3. Each public guardian program that uses volunteers shall develop and implement written procedures for volunteer management and supervision including requirements that each volunteer shall:

a. Complete an orientation program that provides an overview of the Virginia Public Guardian and Conservator Program (§ [ § ] 2.2-711 et seq. of the Code of Virginia).

b. Complete an orientation program that provides an overview of the local public guardian program for which the person intends to serve as a volunteer, including (i) services provided by the local program, (ii) specific duties of the volunteer, (iii) privacy and confidentiality requirements, (iv) recordkeeping and documentation requirements, and (v) indications of

and action to be taken where adult abuse, neglect, or exploitation is suspected.

c. Have a satisfactory work record and personal record and be a person of good character and have not been convicted of any criminal offense involving any physical attack, neglect or abuse of a person, lying, cheating, or stealing nor convicted of any felony. A criminal record check will be conducted on each volunteer accepted by the local program on or after January 1, 2009.

## **22VAC5-30-50. Recordkeeping.**

A. Each public guardian program shall maintain an accurate and complete client record for each incapacitated person. Records shall be kept confidential. Access to client records shall be limited to the client's legal representative; as directed by court order; as directed by duly authorized government authorities or as specifically authorized by the Code of Virginia or federal statutes, including by written consent of the client's legal representative. Provision shall be made for the safe storage of client records or accurate and legible reproductions for a minimum of five years following termination of the guardian or conservator court order.

B. The client's record shall contain a Virginia Uniform Assessment Instrument (UAI) [ or a similar comprehensive assessment instrument ] , a care plan, a values history, the annual report by guardians submitted to the Department of Social Services as required by §37.2-1021 of the Code of Virginia, the annual accounting to the Commissioner of Accounts as required by §26-17.4 of the Code of Virginia, and all applicable court orders and petitions. A client's record shall be completed and on file within 60 days of the program's appointment as guardian.

C. Each public guardian program shall maintain all records, provide reports, including audit information and documents in accordance with its contract with VDA.

## **22VAC5-30-60. Evaluation and monitoring of public guardian programs.**

VDA shall periodically administer, monitor, evaluate, provide technical assistance and expertise, and shall ensure fiscal accountability and quality of service of public guardian programs.

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